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No. 90-853

In the Supreme Court of the United States

OCTOBER TERM, 1990

BANK OF BOULDER, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

GREGORY E. GORE
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

15

QUESTION PRESENTED

Whether the Federal Deposit Insurance Corporation (FDIC), acting as the receiver for a failed bank, may transfer a standby letter of credit to the FDIC in its corporate capacity to facilitate a purchase and assumption transaction involving the failed bank.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-32a) is reported at 911 F.2d 1466. The opinion of the court of appeals panel (Pet. App. 33a-65a) is reported at 865 F.2d 1134. The opinion of the district court (Pet. App. 66a-69a) is reported at 622 F. Supp. 288.

JURISDICTION

The judgment of the en banc court of appeals was entered on August 20, 1990. The petition for a writ of certiorari was filed on November 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Federal Deposit Insurance Corporation (FDIC), acting as receiver of Dominion Bank of Denver (Dominion), transferred a portion of Dominion's assets, including a standby letter of credit, to the FDIC in its corporate capacity as part of a purchase and assumption transaction involving Dominion. Petitioner Bank of Boulder (Boulder), which issued the standby letter of credit, refused the FDIC's demand for payment on the ground that the letter was issued as a non-transferable obligation. The FDIC sued for payment, and the district court granted Boulder's motion to dismiss. Pet. App. 66a-69a. A court of appeals panel (*id.* at 33a-65a) and the en banc court of appeals (*id.* at 1a-32a) reversed the district court's decision, holding that the FDIC could transfer the obligation in the course of a purchase and assumption transaction.

1. The Dominion Bank of Denver and Bank of Boulder are federally insured, state-chartered banks. In 1982, Dominion made a loan to an individual secured by Boulder's standby letter of credit payable to Dominion in the amount of $27,000. The letter of credit did not contain express terms as to transferability. The letter stated, however, that it was subject to the Uniform Customs and Practice for Documentary Credits (UCP), International Chamber of Commerce Pub. No. 290 (rev. 1974), which states that "[a] credit can be transferred only if it is expressly designated as 'transferable' by the issuing bank" (*id.* at art. 46(b)). Pet. App. 1a, 16a-17a, 26a, 68a.

On September 30, 1983, the Colorado State Banking Commissioner declared Dominion insolvent, closed the institution, and tendered an appointment to the FDIC as receiver (FDIC/Receiver). See Colo. Rev. Stat. §§ 11-5-102, 11-5-105 (Supp. 1989). The FDIC accepted the appointment, see 12 U.S.C. 1821(e), and consummated a purchase and

assumption (P & A) transaction pursuant to 12 U.S.C. 1823(c)(2)(A).[1] Under the P & A transaction, FDIC/Receiver sold certain assets and all liabilities of Dominion to a healthy bank and sold remaining assets, including the Dominion letter of credit, to the FDIC in its corporate capacity (FDIC/Corporate). FDIC/Receiver applied the proceeds from the sale of assets to FDIC/Corporate to pay the healthy bank for the difference between the assets the bank purchased and the liabilities it assumed. On September 30, 1983, the entire transaction was approved by the District Court for the City and County of Denver. Pet. App. 1a-2a.

On October 5, 1984, FDIC/Corporate attempted to draw on the letter of credit. Boulder twice refused to honor FDIC/Corporate's demand for payment, and FDIC/Corporate then brought this suit against Boulder in federal district court to obtain payment. Boulder responded that FDIC/Corporate was not entitled to payment because the transfer from FDIC/Receiver to FDIC/Corporate was invalid and that the court lacked subject matter jurisdiction to determine whether FDIC/Receiver was entitled to pay-

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[1] Section 1823(c)(2)(A) of the Federal Deposit Insurance Act, 12 U.S.C. 1823(c)(2)(A), provides in relevant part:

> In order to facilitate a merger or consolidation of an insured bank * * * with an insured institution or the sale of assets of such insured bank and the assumption of such insured bank's liabilities by an insured institution, * * * the Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors [of the FDIC] may prescribe—(i) to purchase any such assets or assume any such liabilities; * * *.

The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 188, makes several non-pertinent changes to the language of this provision. See FIRREA § 217, 103 Stat. 254-261.

ment under 12 U.S.C. 1819 (Fourth).[2] The district court agreed with Boulder and dismissed the action. Pet. App. 68a-69a.

2. A divided panel of the court of appeals reversed, concluding that FDIC/Receiver properly transferred the letter of credit to FDIC/Corporate pursuant to 12 U.S.C. 1823(c)(2)(A) and federal common law, and that subject matter jurisdiction therefore existed to determine the claim. Pet. App. 33a-48a. The court of appeals granted Boulder's petition for rehearing and suggestion for rehearing en banc and likewise reversed the district court. *Id.* at 1a-21a, 64a-65a. The en banc court observed that although the state law on transferability was unclear, *id.* at 9a-10, two independent federal law grounds authorized the transfer of the letter of credit regardless of any state law restrictions. *Id.* at 10a-21a.[3]

First, the en banc court found that Section 1823(c)(2)(A) clearly authorized the transfer of the letter of credit to

[2] Prior to the enactment of FIRREA, Section 1819 (Fourth) deprived federal courts of subject matter jurisdiction over "any such suit to which the Corporation is a party in its capacity as receiver of a state bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law." 12 U.S.C. 1819 (Fourth). In FIRREA, Congress limited that provision to those cases in which the FDIC is not present as a plaintiff; only the preclosing rights of, or obligations owing to, depositors, creditors or shareholders of a state-chartered institution are involved; and the interpretation only of state law is implicated. See FIRREA § 209, 103 Stat. 216-217 (to be codified at 12 U.S.C. 1819(b)(2)(D)).

[3] As to Colorado law, the court observed that it "specifically provides that a letter of credit is not normally assignable." Pet. App. 9a, citing Colo. Rev. Stat § 4-5-116(1) (1973). The court also noted, however, that Colo. Rev. Stat. § 11-5-106(1) (Supp. 1989), which provides that "[a]ll or any part of the assets of a [failed bank] may be sold to the corporation by the * * * liquidator," arguably authorizes FDIC/Receiver to transfer any asset of a failed institution to FDIC/Corporate. Pet. App. 10a.

FDIC/Corporate and preempted any state law that restricted the transfer. Pet. App. 10a-14a. It noted that there was no dispute that FDIC/Receiver had validly obtained possession of the letter of credit from the failed bank by operation of law. The only issue was whether the letter of credit was lawfully transferred from FDIC/Receiver to FDIC/Corporate in the course of the Dominion P & A transaction. *Id.* at 10a. The court observed that Section 1823(c)(2)(A) authorizes FDIC/Corporate to purchase "any" assets of a failed bank to facilitate such transactions, 12 U.S.C. 1823(c)(2)(A), and that this authorization overrides state law limitations on the transferability of such assets. Pet. App. 11a-12a. The en banc court also noted that other federal courts had routinely permitted the transfer of other assets, nontransferable under state law, from FDIC/Receiver to FDIC/Corporate. *Id.* at 12a-14a.

As an independent, alternative basis for its decision, the en banc court held that, in the absence of Section 1823(c)(2)(A), federal common law would provide a uniform rule permitting the transfer of letters of credit to FDIC/Corporate in the course of P & A transactions. Pet. App. 15a. The court relied on the reasoning of *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), which identifies as relevant considerations whether a federal rule is necessary to protect federal programs that "by their nature are and must be uniform in character throughout the Nation," whether the application of state law "would frustrate specific objectives of the federal programs," and "the extent to which application of a federal rule would disrupt commercial relationships predicated on state law" (*id.* at 728-729). Pet. App. 15a.

The court concluded that a uniform federal rule as to transferability of a failed bank's assets is necessary for FDIC/Corporate to make a prompt and reasoned decision whether to finance a P & A transaction. The court explained

that if there were no uniform rule of transferability, FDIC/Corporate would be forced to examine in detail every asset of a failed bank to determine whether state law restricted transferability or whether the asset itself contains such a restriction. Pet. App. 16a-17a.[4] The court next concluded that application of state law rules as to transferability of a failed bank's assets would frustrate the FDIC's program for resolution of failed institutions through cost-efficient P & A transactions. *Id.* at 18a-19a.[5] Finally, the court concluded that a uniform federal rule permitting the transfer of letters of credit would not disrupt commercial relationships predicated on state law because the rule would become effective only upon failure of an insured bank, at which point the parties could not reasonably expect the continuation of customary commercial relationships. *Id.* at 19a-20a.

Judge Logan concurred on the basis that Colo. Rev. Stat. §§ 11-5-105 and 11-5-106 (Supp. 1989) allowed the transfer of the letter of credit to FDIC/Corporate. Pet. App. 21a. Judge Baldock, joined by two other members of the court, concurred in part and dissented in part. *Id.* at 21a-32a.[6]

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[4] The court noted that here the letter of credit did not indicate on its face that it was nontransferable. Therefore, without a uniform federal rule, FDIC/Corporate would be required to review and interpret state law and the UCP to determine whether the asset could be transferred. Pet. App. 16a-17a.

[5] The court explained that the application of state law, with all of its uncertainties, would create an insuperable administrative burden and effectively foreclose the availability of the expedited P & A transaction as an option for bank regulators when a bank is declared insolvent. Pet. App. 17a-18a.

[6] Judge Baldock believed that Colorado law did not make the letter of credit transferable and that the court had jurisdiction over the matter. He disagreed with the court's decision that the FDIC/Corporate had the right to draw on the letter of credit. Judge Baldock stated that

ARGUMENT

The court of appeals correctly concluded that FDIC, acting as a receiver, could transfer a standby letter of credit held by a failed bank—even if that asset were nontransferable under state law—to FDIC acting in its corporate capacity to facilitate a P & A transaction. The court of appeals applied settled principles of law in deciding this case, and its holding does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioner contends (Pet. 7-12) that the court of appeals' interpretation of 12 U.S.C. 1823(c)(2)(A) conflicts with other provisions of the Federal Deposit Insurance Act, specifically 12 U.S.C. 1819 (Fourth), 12 U.S.C. 1821(d) and 12 U.S.C. 1823(d). Those provisions, however, simply recognize that the FDIC, acting as receiver, is subject in various circumstances to state law. They do not stand for the proposition that FDIC/Receiver is subject in all circumstances to state law, nor do they address the specific question at issue here: whether FDIC/Receiver may sell a letter of credit to FDIC/Corporate to facilitate a purchase and assumption of a failed bank. Section 1823(c)(2)(A) *does* address that issue, and its plain terms authorize the sale. See 12 U.S.C. 1823(c)(2)(A). Thus, petitioners' invocation

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it was improper to fashion a federal common law rule when the court had decided the issue on preemption grounds. Pet. App. 23a. Additionally, he stated that the court's holding on preemption subjects the bank that had issued the letter of credit to unanticipated risk and adversely affects state commercial laws concerning letters of credit. *Id.* at 29a-30a. Finally, he stated that there was no need for a federal common law rule because both Article 5 of the Uniform Commercial Code (1985) and the UCP are in use in all 50 states. Pet. App. 31a-32a.

of other, irrelevant sections of federal banking law provides no basis for this Court's review.[7]

2. Petitioner also incorrectly asserts (Pet. App. 13-15) that the lower court's decision conflicts with 12 U.S.C. 1823(e). As this Court explained in *Langley* v. *FDIC*, 484 U.S. 86 (1987), Section 1823(e) provides that no agreement that tends to defeat FDIC's interests is valid against FDIC unless the agreement, among other things, is in writing, properly executed and approved, and kept as an official bank record. 12 U.S.C. 1823(e). Petitioner contends that the letter of credit contains a restriction on transfer that met the requirements of Section 1823(e) and argues, by negative implication, that the agreement must therefore be enforceable against the FDIC. Pet. 13-16.

As an initial matter, it is not clear that the letter of credit contains a restriction on transfer that meets Section 1823(e)'s requirements.[8] In any event, the mere fact that an agree-

[7] Petitioner also argues (Pet. 10-11, 12) that the court of appeals' decision conflicts with *Trigo* v. *FDIC*, 847 F.2d 1499, 1502-1503 n.4 (11th Cir. 1988), and *FDIC* v. *Sumner Financial Corp.*, 602 F.2d 670, 683 (5th Cir. 1979). Petitioner relies on a footnote in *Trigo* and a passage in *Sumner* that simply note that when FDIC is acting as a receiver, it is generally subject to state law. Neither of those decisions interprets Section 1823(c)(2)(A) or addresses the transferability of an asset from FDIC/Receiver to FDIC/Corporate. To the extent that petitioner challenges FDIC/Receiver's power to sell such assets as distinct from FDIC/Corporate's power to purchase them, Congress has eliminated any doubt that those powers are coextensive. Section 217 of FIRREA states that FDIC, acting as receiver, "shall be entitled to offer the assets of [a failed] depository institution for sale to the Corporation." 103 Stat. 256 (to be codified at 12 U.S.C. 1823(d)(1)). That provision, which mirrors FDIC/Corporate's authorization to purchase such assets (103 Stat. 256, to be codified as 12 U.S.C. 1823(d)(4)), confirms that the FDIC's power to sell and its power to purchase a fail bank's assets are governed by federal law.

[8] The court of appeals concluded that nothing on the face of the letter of credit indicated that it could not be transferred. Pet. App. 16a.

ment meets those requirements does not automatically make the agreement enforceable against FDIC or immunize the agreement from the effects of positive law. See *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 22 (1977). In this case, the relevant federal statute, 12 U.S.C. 1823(c)(2)(A), authorizes FDIC/Corporate to purchase "any" assets of a failed bank to facilitate a P & A transaction. Dominion and Boulder could not insulate their letter of credit from that power by a private agreement restricting the transferability of the asset. See *United States Trust Co.*, 431 U.S. at 22; *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 437-438 (1934); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 357 (1908).

3. Petitioner next contends (Pet. 17-18, 24-30) that the lower court's alternative basis for its decision—that federal common law requires a uniform rule of transferability of letters of credit in the course of P & A transactions—conflicts with opinions of this Court in *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447 (1942) and *Langley*. In *D'Oench*, this Court fashioned a federal common law rule that, like its statutory counterpart (12 U.S.C. 1823(e)) discussed in *Langley*, protects the FDIC from a bank's inaccurate representations as to its assets and from unrecorded side agreements that are not reflected in a bank's records. 315 U.S. at 457. Neither *D'Oench* nor *Langley*, however, addresses the issue involved in this case—whether FDIC/Corporate may purchase a failed bank's letter of credit despite state law transfer restrictions.

The court of appeals also concluded that state law did not definitively answer whether FDIC/Receiver could transfer a letter of credit to the FDIC/Corporate. *Id.* at 10a, 17a. Although the letter of credit indicated that it was subject to the UCP, as the court explained, the UCP does not address the transferability of a letter of credit from the FDIC/Receiver to the FDIC/Corporate; it simply contains a general restriction on transfer. *Id.* at 17a.

Petitioner also asserts (Pet. 18-24) that even if the lower court's ruling on federal common law is not inconsistent with *Langley*, the court erred in assuming "legislative facts" from *Langley* and other cases which were not part of the evidence in this case. See Pet. App. 6a & n.3. Petitioner has not shown, however, that this Court or the court of appeals has misconceived the nature of P & A transactions. The lower court properly took into account factors, such as the need for prompt consummation of the transaction, in concluding that, if Section 1823(c)(2)(A) did not exist, it would be appropriate under *Kimbell Foods* to fashion a uniform rule to ensure the transferability of assets from FDIC/Receiver to FDIC/Corporate.

4. Petitioner fails to identify any conflict among the courts of appeals on the particular statutory issue in this case—whether Section 1823(c)(2)(A), which authorizes FDIC/Corporate to purchase "any" assets of a failed bank to facilitate a P & A transaction, includes assets that are nontransferable under state law. As the court of appeals explained, its affirmative resolution of the issue is consistent with the decisions of other courts holding that assets such as tort claims and fiduciary obligations, which are not transferable under state law, are transferable in the course of a FDIC-facilitated P & A transaction. Pet. App. 13a-14a & n.4.

In any event, the decision in this case has limited future importance. The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 188, clarified existing law by expressly providing that the FDIC, acting as receiver, may "transfer any asset or liability of the institution in default * * * without any approval, assignment, or consent to such transfer." FIRREA § 212, 103 Stat. 226-227 (to be codified at 12 U.S.C. 1821(d)(2)(G)). Thus, Congress has resolved the issue prospectively and no further review is necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

MARK I. ROSEN
Deputy General Counsel

DOROTHY L. NICHOLS
Associate General Counsel

ANN S. DUROSS
Assistant General Counsel

COLLEEN B. BOMBARDIER
Senior Counsel

GREGORY E. GORE
Counsel
Federal Deposit Insurance Corporation

FEBRUARY 1991

U.S. GOVERNMENT PRINTING OFFICE 1991 - 282-061/20753